

OFFICE OF GENERAL COUNSEL

M E M O R A N D U M

TO: Chief, Dockets Division

FROM: Associate General Counsel, Litigation Division

SUBJECT: Panhandle Telephone Cooperative, Inc. v. FCC & USA,
No. 94-1614. Filing of a new Petition for Review
filed in the United States Court of Appeals for the
D.C. Circuit.

DATE: September 9, 1994

Docket No(s). ET 93-266 and GEN 90-314

File No(s). PP-6, PP-52 and PP-58

This is to advise you that on September 6, 1994, Panhandle Telephone Cooperative, Inc., filed a Section 402(a) Petition for Review in the U.S. Court of Appeals for the D.C. Circuit. The FCC underlying decisions are: In the Matter of Amendment of the Commission's Rules to Establish New Personal Communications Services, 9 FCC Rcd 1337 (1994) (FCC 93-550) and In the Matter of Review of the Pioneer's Preference Rules & In the Matter of Amendment of the Commission's Rules to Establish New Personal Communications Services, FCC 94-209, released August 9, 1994.

Challenge to FCC amended pioneer's preference rule, as applied to broadband personal communication services so as to require preference winners to pay for their licenses an amount keyed to the auction prices paid for similar licenses. Petitioner challenges both the decision to charge for the pioneers' licenses and the earlier decisions to grant pioneer's preference to three applicants.

Due to a change in the Communications Act, it will not be necessary to notify the parties of this filing.

The Court has docketed this case as No. 94-16148 and the attorneys assigned to handle the litigation of this case are John E. Ingle and James Carr.


Daniel M. Armstrong

cc: General Counsel
Office of Public Affairs
Shepard's Citations

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Panhandle Telephone Cooperative, Inc.)

Petitioners,)

v.)

Federal Communications Commission and)
United States of America,)

Respondents.)

Case No. 94-1614

Filed: 9/6/94

PETITION FOR REVIEW

Panhandle Telephone Cooperative, Inc., ("Panhandle") by its attorneys, petitions this Court for review of the Memorandum Opinion and Order on Remand of the Federal Communications Commission ("Commission") in the proceeding entitled In the Matter of Amendment of the Commission's Rules to Establish New Personal Communications Services, FCC 93-550, GEN Docket 90-314, PP-6, PP-52, and PP-58 (released August 9, 1994) ("Remand Order"). A summary of this Order was published in the Federal Register on August 18, 1994. See 59 Fed. Reg. 42,521 (August 18, 1994). A copy of this Order is attached.

This Petition is filed pursuant to 28 U.S.C. §§ 2342, 2344; Section 402(a) of the Communications Act of 1934, as amended, 47 U.S.C. § 402(a); Rule 15 of the Federal Rules of Appellate Procedure; and D.C. Circuit Rule 41(b). Venue lies in this Court pursuant to 28 U.S.C. § 2343.

Panhandle has previously sought this Court's review of the underlying agency action in this matter, the Third Report and Order, GEN Docket 90-314, released February 3, 1994, and published at 58 Fed. Reg. 9419 (February 28, 1994).¹ ("Third Report and Order"). A copy is attached. The Third Report and Order denied Petitioner's pioneer's preference request despite Panhandle's demonstrated development of innovative broadband Personal Communications Services (PCS) for use in rural areas.

Notwithstanding the fact that this Court remanded all pending issues to the FCC, the Remand Order did not address the issues particular to Panhandle which were raised on appeal, e.g. the basis for denying Panhandle's request. Nor is it likely that the FCC will address these issues during the course of this appeal, as

¹ Panhandle Telephone Cooperative, Inc. v. F.C.C., Case No. 94-1158, was consolidated with several others under Case No. 94-1148 (the Pacific Bell cases) and remanded to the Commission pursuant to the Court's Order of July 26, 1994. Panhandle did not file a Petition for Reconsideration of the Third Report & Order. See 47 C.F.R. § 1.429(j) (filing of a petition for reconsideration is not a precondition to judicial review).

Panhandle did not file a petition for reconsideration.² Moreover, the FCC apparently intended from the outset that any proceedings on remand would not address or explain its prior decisions with respect to its pioneer's preference award or denial decisions. See, e.g., Emergency Motion for Remand of the Federal Communications Commission, filed July 8, 1994, at 4 ("We are not requesting remand just to have the opportunity to better explain the Commission's prior decisions"). Rather, the FCC requested remand to address whether preference winners should pay for their licenses. Id., at 3. Judicial review of Panhandle's issues at this juncture should not interfere with the Commission's pending reconsideration proceedings.

Accordingly, Petitioners again ask this Court to vacate and set aside that portion of the Third Report and Order which rejected Petitioner's request for a pioneer's preference, and direct the Commission to grant Petitioner's request or, in the alternative, remand the matter to the Commission for an adjudicatory decision consistent with the Administrative Procedure Act, 5 U.S.C. § 706.

This prayer for relief is based on the grounds that the Third Report and Order and the Remand Order's implicit affirmation of

² See, e.g., Remand Order at 1, n.1 (FCC states that the Remand Order should not be taken as prejudgment of the petitions for reconsideration of its broadband PCS pioneer's preference decisions).

that decision, is contrary to the Commission's stated rules³; is arbitrary, capricious and unsupported by reasoned analysis in that the Commission failed to consider relevant experimental results submitted by Panhandle, and otherwise violates the provisions of the Administrative Procedure Act, 5 U.S.C. § 706.

Respectfully submitted,

Panhandle Telephone Cooperative, Inc.

By _____

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September 6, 1994

³ The Commission's rules governing the application for, and award of, a pioneer's preference are set forth at 47 C.F.R. §§ 1.402, 1.403 and 5.207.